

1 COOLEY GODWARD KRONISH LLP  
 2 MICHAEL G. RHODES (116127) ([rhodesmg@cooley.com](mailto:rhodesmg@cooley.com))  
 3 HEATHER C. MESERVY (223782) ([hmeservy@cooley.com](mailto:hmeservy@cooley.com))  
 4 4401 Eastgate Mall  
 5 San Diego, CA 92121  
 6 Telephone: (858) 550-6000  
 7 Facsimile: (858) 550-6420

8 COOLEY GODWARD KRONISH LLP  
 9 WHITTY SOMVICHIAN (194463) ([wsomvichian@cooley.com](mailto:wsomvichian@cooley.com))  
 10 101 California Street 5th Floor  
 11 San Francisco, CA 94111  
 12 Telephone: (415) 693-2000  
 13 Facsimile: (415) 693-2222

14 Attorneys for Defendant eBay, Inc.

15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

MICHELE MAZUR, On Behalf of Herself  
 and all Others Similarly Situated,

Plaintiff,

v.

EBAY, INC., HOT JEWELRY  
 AUCTIONS.COM d/b/a JEWELRY  
 OVERSTOCK AUCTIONS, HOT  
 JEWELRY AUCTIONS.COM d/b/a  
 PARAMOUNT AUCTIONS, and DOES 1-  
 100, inclusive,

Defendants.

Case No. C07 3967 MHP

**DEFENDANT EBAY'S NOTICE OF MOTION  
 AND MOTION TO STAY ACTION PENDING  
 RESOLUTION OF THE ARBITRATION  
 BETWEEN PLAINTIFF MAZUR AND  
 DEFENDANT HJA**

Date: Mon. Dec. 17, 2007  
 Time: 2:00 p.m.  
 Judge: Hon. Marilyn H. Patel  
 Trial Date: Not yet set

## **NOTICE OF MOTION AND MOTION TO STAY**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD IN THIS MATTER:

PLEASE TAKE NOTICE that on Monday, Dec. 17, 2007, at 2:00 p.m., or as soon thereafter as this motion may be heard, Defendant eBay Inc. (“eBay”) will move the Court for an Order staying the present action until resolution of Plaintiff’s arbitration with Defendant Hot Jewelry Auctions.com (“HJA”). This motion to stay is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, eBay’s Motion to Dismiss and the Request for Judicial Notice and Declaration filed in support of eBay’s Motion to Dismiss, the pleadings on file, oral argument of counsel, and such other materials and argument as may be presented in connection with the hearing on the motion.

## **STATEMENT OF ISSUE TO BE DECIDED**

Whether eBay is entitled to a stay of litigation pending resolution of the arbitration of Plaintiff's claims against HJA.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

As the Court is aware, defendant HJA has requested that all claims against it be stayed so that HJA and Plaintiff Mazur can resolve their dispute in arbitration. eBay respectfully joins in HJA’s motion to stay and further requests that this case be stayed in its entirety as to all defendants until that arbitration is resolved. The arbitration between plaintiff and HJA will determine whether HJA has or has not engaged in the alleged “shill bidding” practices that are the foundation of plaintiffs’ case. Staying this litigation in its entirety will serve judicial economy by allowing the arbitration to proceed to determine whether plaintiff can prove the facts that are the essential predicate of her claims against *both* HJA and eBay. If plaintiff cannot prove in the arbitration that HJA engaged in shill-bidding, there will be no need to litigate any claims against eBay in this case, which all derive from that core allegation. In contrast, allowing the case against eBay and the arbitration against HJA to proceed simultaneously would lead to wasteful and duplicative litigation of identical issues and necessarily prejudice the interests of one or both of the defendants, as further discussed below. Accordingly, eBay respectfully requests that if the

1 Court grants HJA's motion to stay, that the stay be extended to all claims against all defendants  
 2 including eBay.<sup>1</sup>

3 **II. ARGUMENT**

4 **A. Courts Have Consistently Granted Stays in Similar Circumstances.**

5 The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), embodies a federal policy  
 6 strongly favoring arbitration. *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226  
 7 (1987), rehearing denied 483 U.S. 1056. The FAA provides that any litigation between parties  
 8 bound by an arbitration agreement must be stayed to permit an arbitration to go forward.

9 If any suit or proceeding be brought in any of the courts of the  
 10 United States upon any issue referable to arbitration under an  
 11 agreement in writing for such arbitration, the court in which such  
 12 suit is pending, upon being satisfied that the issue involved in such  
 13 suit or proceeding is referable to arbitration under such an  
 14 agreement, shall on application of one of the parties stay the trial of  
 15 the action until such arbitration has been had in accordance with the  
 16 terms of the agreement, providing the applicant for the stay is not in  
 17 default in proceeding with such arbitration.

18 9 U.S.C. § 3.

19 Where a litigation to be stayed pursuant to the FAA also involves additional defendants  
 20 who are not parties to the arbitration provision, the U.S. Supreme Court has cautioned that "it  
 21 may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the  
 22 arbitration." *See Moses H. Cone Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 20 n.23 (1983).  
 23 Recognizing the Supreme Court's concerns, federal courts have consistently stayed claims against  
 24 both the arbitrating defendant and a nonarbitrating defendant where (1) the claims against both  
 25 defendants arise from the same operative facts; (2) the nonarbitrating defendant's liability stems  
 26 from the arbitrating defendant's liability; and (3) going forward with litigation would thwart the  
 27 federal policy in favor of arbitration and would adversely affect the arbitrating defendant's right  
 28 to arbitrate. *Harvey v. Joyce*, 199 F.3d 790, 795-96 (5th Cir. 2000). Other federal courts,  
 including the courts of this District, have granted a global stay under similar circumstances. *See*  
*Amisil Holdings Ltd. v. Clarium Capital Mgmt.*, 2007 WL 2768995, \*16 (N.D. Cal. Sept. 20,

---

1 If the Court does not stay this case, then eBay requests that the Court address its Motion to  
 2 Dismiss on the merits and dismiss all of plaintiffs' claims under Rule 12(b)(6).

1       2007) (favoring stay of litigation against non-signatory defendants pending signatories' 2 arbitration because claims against non-signatories "are based upon the same facts" as the claims 3 against signatory defendants); *Fujian Pacific Elec. Co. Ltd. v. Bechtel Power Corp.*, 2004 WL 4 2645974, \*6 (N.D. Cal. Nov. 19, 2004) (staying litigation against non-signatory because pursuing 5 litigation while signatories resolve related dispute in arbitration would prejudice signatories' 6 arbitration rights); *Spencer Furniture, Inc. v. Media Arts Group, Inc.*, 349 F. Supp. 2d 49, 53-54 7 (D. Mass. 2003) (staying litigation against non-signatory because pursuing litigation while 8 arbitration analyzes claims "aris[ing] from the same operative facts" would render arbitration 9 proceedings "redundant and meaningless," prejudicing signatories' arbitration rights).

10       The Fifth Circuit's *Harvey* case illustrates the compelling reasons that favor a global stay 11 which squarely apply here. In *Harvey*, plaintiff stockholders sued a stockholder and the 12 corporation, asserting claims for breach of contract, breach of fiduciary duty, and unjust 13 enrichment. The plaintiff and defendant stockholders were bound to arbitrate their claims 14 pursuant to contractual agreement. The corporation, not a signatory to the arbitration agreement, 15 sought to stay the litigation against it pending the arbitration among the other parties. The district 16 court refused to stay the action against the corporation, but the Fifth Circuit Court of Appeals 17 reversed. In its holding, the Fifth Circuit recognized both (i) that simultaneous litigation and 18 arbitration on overlapping issues would be wasteful, and (ii) that permitting litigation to go 19 forward would undermine the important policy objectives of the FAA in favor of arbitration. In 20 particular, the Fifth Circuit stressed that staying litigation is particularly important when *the non-* 21 *signatory's liability derives from the signatory's liability, and the claims asserted against the* 22 *non-signatory are based on the same operative facts and thus intertwined with the claims against* 23 *the signatory:*

24       Because [the non-signatory's] potential liability derives from [the 25 signatory's] conduct, the claims asserted against [the non-signatory] 26 are based on the same operative facts and are inherently inseparable 27 from the claims against [the signatory]. Furthermore, a suit against 28 [the non-signatory] could have a critical impact in the [signatory's] arbitration. If [the non-signatory] were forced to try the case, the arbitration proceedings would be both redundant and meaningless; in effect, thwarting the federal policy in favor of arbitration. Therefore, we fail to see how litigation could proceed as to [the

1 non-signatory] without adversely affecting [the signatory's] right to  
 2 arbitrate.

3 *Harvey*, 199 F.3d at 795-96 (internal citations omitted).

4 **B. This Action Should Be Stayed In Its Entirety Pending Resolution of the  
 5 Arbitration Between Plaintiff and HJA.**

6 Each of the factors recognized in *Harvey* and similar cases as favoring a global stay of  
 7 litigation is present here. First, the claims against both HJA and eBay arise from precisely the  
 8 same operative facts. All of Plaintiff's claims arise from allegations that HJA engaged in "shill  
 9 bidding" that unlawfully increased the sale prices of jewelry auctioned via  
 10 www.liveauctions.eBay.com. Plaintiff seeks to hold HJA directly liable for her damages  
 11 stemming from those alleged shill-bidding practices. And she seeks to hold eBay *indirectly* liable  
 12 for (i) providing a venue for the alleged shill-bidding, (ii) failing to prevent the shill-bidding, and  
 13 (iii) making representations inconsistent with shill-bidding. Thus, Plaintiff's causes of action  
 14 against both HJA and eBay all stem from the same factual predicate.

15 Second, any potential liability that eBay faces in this litigation is entirely derivative of  
 16 HJA's liability. None of the causes of action asserted against eBay is viable unless Plaintiff can  
 17 prove that HJA breached its agreement or otherwise violated the law by engaging in the shill-  
 18 bidding practices alleged in the Complaint. Plaintiff has not alleged any claim against eBay (nor  
 19 could she) that could possibly proceed if she is unable to show that HJA in fact engaged in shill-  
 20 bidding on eBay's Website.<sup>2</sup>

21 Under these circumstances, the litigation against eBay should be stayed so that the  
 22 foundational issues of HJA's alleged conduct can first be resolved in the arbitration with HJA.

---

23 <sup>2</sup> Not only does this factor weigh in favor of staying Plaintiff's claims against eBay pending  
 24 resolution of Plaintiff and HJA's arbitration, but it militates in favor of granting eBay's motion to  
 25 dismiss Plaintiff's claims based on eBay's immunity under the Communications Decency Act, 47  
 26 U.S.C. § 230 ("CDA"). The CDA prohibits Plaintiff from holding eBay liable for being a conduit  
 27 of the misrepresentations and other alleged improper conduct of HJA. Furthermore, Plaintiff  
 28 cannot circumvent the CDA by alleging (i) that eBay affirmatively misrepresented the safety of  
 live auctions accessed via eBay, or (ii) that eBay knew of HJA's alleged wrongful behavior and  
 failed to protect Plaintiff and other class members from it. See *Gentry v. eBay*, 99 Cal. App. 4th  
 816, 833-34 (2002).

1 Most critically, the arbitration will determine whether or not HJA in fact engaged in the shill  
 2 bidding practices alleged in the complaint. If HJA did not, then Plaintiff's claims against eBay  
 3 will necessarily fail. Accordingly, the Court should stay Plaintiff's action against eBay until the  
 4 arbitration is resolved, to avoid the needless burden and expense that would be imposed on the  
 5 parties and the Court from litigation that may ultimately turn out to be entirely moot, and the  
 6 substantial risks for confusion and inconsistent results that would arise from duplicative  
 7 proceedings.

8 Further, as in *Harvey*, proceeding with the litigation as to eBay would adversely affect  
 9 HJA's right to arbitrate and thwart the federal policy in favor of arbitration. If the stay is limited  
 10 to HJA and not extended to eBay as well, Plaintiff would be able to circumvent the FAA-  
 11 mandated stay because litigating the claims against eBay would necessarily require discovery and  
 12 other proceedings targeted at HJA. Allowing this case to proceed against eBay would therefore  
 13 disrupt the arbitration proceedings with HJA and potentially render them redundant or  
 14 meaningless. *See generally Fed. Ins. Co. v. Super. Ct.*, 60 Cal. App. 4th 1370, 1374-5 (1998)  
 15 (analyzing California's arbitration act to overturn trial court's refusal to stay litigation while an  
 16 arbitration was pending). On the other hand, if discovery in this matter is stayed as to HJA but  
 17 litigation is otherwise allowed to proceed against eBay, eBay would be prevented from  
 18 adequately investigating the facts needed to defend against Plaintiff's claims, which all stem from  
 19 the alleged conduct of HJA. In either case, having a limited stay covering only HJA would  
 20 unfairly prejudice the interests of one or both of the defendants.

21 In contrast, a stay would protect the rights of all parties by preserving the status quo until  
 22 the arbitration is resolved. Plaintiff will not be prejudiced in any way by a global stay of this case  
 23 pending resolution of the arbitration. eBay has already instituted evidence preservation practices  
 24 with respect to evidence that is potentially relevant in this action. Thus, Plaintiff will be able to  
 25 proceed with this case after the arbitration is resolved if her claims against eBay remain viable at  
 26 that point. Any harmless inconvenience potentially caused by a stay is overwhelmingly  
 27 outweighed by the benefits of promoting the federal policy in favor of arbitration and avoiding  
 28 duplication of effort, unnecessary litigation burden and expense, and the possibility of

1 inconsistent outcomes.

2 **III. CONCLUSION**

3 For the foregoing reasons, eBay respectfully requests that this Court enter an order staying  
4 the litigation of Plaintiff's claims against eBay until after the arbitration between Plaintiff and  
5 HJA is resolved.

6 Dated: November 12, 2007

Respectfully submitted,

7 COOLEY GODWARD KRONISH LLP  
8 MICHAEL G. RHODES (116127)  
WHITTY SOMVICHIAN (194463)  
HEATHER C. MESERVY (223782)

10 /s/Heather C. Meservy  
11 Heather C. Meservy (223782)  
12 Attorneys for Defendant eBay Inc.  
Email: hmeservy@cooley.com

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## **CERTIFICATE OF SERVICE**

I hereby certify that on November 12, 2007, I electronically filed the foregoing  
**DEFENDANT EBAY'S NOTICE OF MOTION AND MOTION TO STAY ACTION**  
**PENDING RESOLUTION OF THE ARBITRATION BETWEEN PLAINTIFF MAZUR**  
**AND DEFENDANT HJA** with the Clerk of Court using the CM/ECF system, which will send  
notification of such filing to the following attorneys of record at the following listed email  
addresses.

Craig Stuart Lanza	email: <a href="mailto:cylanza@balestriere.net">cylanza@balestriere.net</a>
Matthew A. Siroka	email: <a href="mailto:mas@defendergroup.com">mas@defendergroup.com</a> <a href="mailto:jb@balestriere.net">jb@balestriere.net</a>
Stephen Scott Walters	email: <a href="mailto:SWalters@allenmatkins.com">SWalters@allenmatkins.com</a>

I also hereby certify that I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Diego, California on this 12<sup>th</sup> day of November, 2007 to the following listed addresses.

John Balestriere  
Balestriere PLLC  
225 Broadway  
Suite 2700  
New York, NY 10007

Kendra Hix

Kendra A. Jones  
COOLEY GODWARD KRONISH LLP  
4401 Eastgate Mall  
San Diego, CA 92121-1909  
Telephone: (858) 550-6000  
FAX: (858) 550-6420  
Email: kjones@cooley.com